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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/445,043	03/20/2000	IAN BAIRD-SMITH	350013-65	9395
34205	7590	12/01/2008	EXAMINER	
OPPENHEIMER WOLFF & DONNELLY LLP 45 SOUTH SEVENTH STREET, SUITE 3300 MINNEAPOLIS, MN 55402				HYLTON, ROBIN ANN ETTE
ART UNIT		PAPER NUMBER		
3781				
MAIL DATE		DELIVERY MODE		
12/01/2008		PAPER		

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 09/445,043

Filing Date: March 20, 2000

Appellant(s): BAIRD-SMITH ET AL.

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Barbara A. Wrigley  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed August 25, 2008 appealing from the Office action mailed January 7, 2008.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

**(4) Status of Amendments After Final**

No amendment after final has been filed.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

JP 62-122962	SEKIGUCHI et al.	6-1987
JP 6-219464	HIROSHI	9-1994
US 4,328,905	HARDT et al.	

**(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1,3,6,9,10, and 13 are rejected under 35 U.S.C. 102(b) as being anticipated by Sekiguchi et al. (JP 62-122962).

Sekiguchi discloses a container assembly comprising a container **1** having a second cam and follower pair, a flexible membrane **2**, an adhesive seal between the flexible membrane and the container, a rigid cap **3** having a resilient deformable member **5** juxtaposed to the flexible membrane, a first cam and follower pair, a laminar member and annular skirt depending from the laminar member, wherein the laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane toward the laminar member.

Figure 1 depicts the rigid cap attached to the container with an airspace between the flexible membrane **2** and the rigid cap **3**. The fourth paragraph on page 4 discloses the expansion and contraction of the airspace **4** prevents rupture of the flexible membrane. The airspace is contracted and expanded by movement of the flexible membrane. It can be seen that the lowermost point of the laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane towards the laminar member.

Claim 8 is rejected under 35 U.S.C. 103(a) as being unpatentable over Sekiguchi.

Sekiguchi discloses the claimed container assembly except for the resiliently deformable member comprising a foamed material.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to form the resiliently deformable member of a foamed material, since it has

been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. Doing so allows for a more resilient sealing member.

Claim 11 is rejected under 35 U.S.C. 103(a) as being unpatentable over Sekiguchi in view of Hardt (US 4,328,905).

Sekiguchi teaches the claimed closure except for a pull tab hingedly attached to the membrane.

Hardt teaches a membrane closure having a pull tab hingedly attached thereto.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to apply the teaching of a hingedly attached pull tab to the membrane of Sekiguchi. Doing so would provide a graspable member to allow for easy removal of the membrane from a container mouth.

Claims 1,3,4,6,8-10, and 13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hiroshi (JP 6-219464) in view of Sekiguchi.

Hiroshi discloses a container assembly comprising a container **1** having a second cam and follower pair, a flexible membrane **3**, an adhesive seal **4** between the flexible membrane and the container, a rigid cap having a resilient deformable member **6** juxtaposed to the flexible membrane, a first cam and follower pair, a laminar member **5** and annular skirt **7** depending from the laminar member. Hiroshi is silent regarding the laminar member being spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane toward the laminar member.

Sekiguchi teaches it is known to provide a container assembly wherein the laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane toward the laminar member.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to apply the teaching of providing the laminar member being spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane toward the laminar member. Doing so provides a container liner seal that is less likely to rupture due to pressure build-up within the sealed container.

Regarding claim 4, the outer portion **2** of the can comprising the screw threads has an upper edge that is considered to be a flange.

Regarding claim 9, Hiroshi teaches the claimed invention except for the flexible membrane being made of a metal foil. It would have been obvious to one having ordinary skill in the art at the time the invention was made to make the flexible membrane of metal foil, since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. Doing so allows for a more resilient sealing member.

Claim 11 is rejected under 35 U.S.C. 103(a) as being unpatentable over the prior art as applied to claim 1 above, and further in view of Hardt.

Hiroshi teaches the claimed closure except for a pull tab hingedly attached to the membrane.

Hardt teaches a membrane closure having a pull tab hingedly attached thereto.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to apply the teaching of a hingedly attached pull tab to the membrane of Hiroshi. Doing so

would provide a graspable member to allow for easy removal of the membrane from a container mouth.

#### **(10) Response to Argument**

In response to appellant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

The rejection of the appealed claims is based upon the knowledge of one of ordinary skill in the art at the time the invention was made with regard to flexible foil seals and retortable containers. The knowledge of flexible foil membranes as used to seal retortable containers having a removable closure cap (laminar member) leads one to conclude that the membrane of Sekiguchi would flex upon pressure build-up in the closed container. The air space (4) is expanded and contracted as the flexible membrane (2) flexes both toward and away from the laminar member (3) as disclosed at page 4, paragraphs 3- 4.

It is asserted by the examiner that the laminar member is inherently spaced from the flexible member by a distance less than the maximum possible extension of the flexible membrane towards the laminar member. As seen in Fig. 1, the flexible membrane is shown to be at its maximum spaced distance from the laminar membrane. As discussed above, the flexible membrane moves toward the laminar member with the build-up of pressure inside the closed container. The smallest amount of movement of the flexible membrane toward the laminar member will meet the claimed limitation. This can be seen in the drawings despite there being no disclosure of the drawings being drawn to scale.

Appellant further argues the disclosure of the drawings cannot be relied upon since the drawings are not disclosed as being drawn to scale. Wherein the drawings are not stated as being drawn to scale, the drawings in combination with the written disclosure and the knowledge of one of ordinary skill in the art that the time of the invention can be relied upon for their disclosure as a whole.

The argument regarding the depending claims are directed to the teaching of Hardt, as applied to the claims, does not provide the purported limitation of "the laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane towards the laminar member" and therefore does not add to the rejection. The teaching of Hardt does in fact provide the missing teaching of a pull tab to the closure as set forth in the rejection above.

#### **(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

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